APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

AJAX REALTY CORPORATION,	)	
	)	
Plaintiff,	)	
	)	CIVIL
v.	)	ACTION
	)	NO. 6881-N
J. F. ZOOK, INC., et als,	)	
	)	
Defendants.	)	

MEMORANDUM ORDER

Plaintiff instituted this action against numerous defendants, among them Durell Products, Incorporated (Durell), for alleged breach of implied warranties relative to the sale of aluminum window frames. Durell filed a motion to dismiss or quash the service of process as to it. In support of the motion it attached an affidavit of its President. Plaintiff filed an affidavit of its Vice-President. No other evidence is offered in favor of or in opposition to the motion.

Plaintiff states in its brief in opposition to the motion that it "accepts as factual the facts recited under Durell's portion of its memorandum entitled 'The Nature of the Action'."

The window frames in question were manufactured by Durell at Seattle, Washington; it is a Washington Corporation; and it does "almost all of its business in five western states." It has never been domesticated in Virginia and has never had or maintained any manufacturing, sales office, storage or other business facility in Virginia. None of its officers, directors or employees have ever been in Virginia on any company business,

except to investigate the damage claim asserted in this suit. It has never advertised, solicited, or contracted any sales in Virginia, and its products are not distributed in Virginia. It has never had a distributor, jobber, broker, agent or manufacturer's representative in Virginia.

Durell sold the windows in question to C&S Sales of Denver, Colorado. The transaction was handled entirely outside of Virginia, and Durell was not in any way involved in the transaction which resulted in the sale and use of the frames in Virginia. Neither C&S Sales nor any of its personnel is an agent, representative, jobber, broker or distributor for Durell.

The sale by Durell to C&S Sales was for unglazed frames and without window glass. While the frames were being manufactured C&S Sales requested Durell to forward a sample frame to a Mr. Diamond in Chicago so that Diamond could make preparations to install glass in the frames. Thereafter Durell was directed to ship the frames to Norfolk, Virginia. The freight was prepaid and billed to C&S Sales. Later some additional frames were shipped to replace frames damaged in transit. The frames were glazed and installed by others. Durell had no further contact with the frames until advised of the alleged defects, at which time it offered its assistance in attempting to alleviate the problem.

Durell has no contract to supply or furnish services in Virginia, is not engaged in any course of conduct in Virginia, nor does it derive "substantial revenues" for services performed in Virginia. It appears the only time it had an employee or representative in Virginia was when its representative came to Virginia to see if assistance could be given to alleviate the leaking condition complained of by plaintiff.

Durell is alleged to be a non-resident of Virginia, and it is. Process for it was served on the Secretary of the Commonwealth of Virginia, pursuant to the provisions of the Long Arm Statute. This defendant moves to dismiss the action or quash the return of service of summons.

The burden of pleading and when challenged of supporting jurisdictional facts by competent and preponderant proof is upon the plaintiff. *McNutt* v. *General Motors Acceptance Corporation*, 298 U.S. 178, 182, 189; *Kvos, Inc.* v. *Associated Press*, 299 U.S. 269, 278; *Bowman* v. *White*, 388 F.2d 756, 760 (4th Cir. 1968); *Hedberg* v. *St. Farm Mutual*, 350 F.2d 924, 929 (8th Cir. 1965). The complaint must state on its face the grounds for the Court's jurisdiction. Federal Rules of Civil Procedure, Rule 8(a)(2). *Bowman* v. *White*, supra, *Gold-Washing and Water Co.* v. *Keyes*, 96 U.S. 199; *Ivey* v. *Frost*, 346 F.2d 115 (8th Cir. 1965).

To exercise jurisdiction over Durell, an out-of-state defendant, on the facts of this case, plaintiff must point to some United States statute, Virginia statute or rule of court authorizing such assertion of jurisdiction. There is no such United States statute. Hence, we turn to the Long Arm Statute of Virginia, Title 8, Chapter 4.1 of the Code of Virginia 1950, as amended in 1964, the pertinent section being 8-81.2. That Chapter provides that whenever "person" is used in the Chapter, it shall include "corporation, etc." The pertinent parts of the Section are:

> § 8-81.2 When personal jurisdiction over person may be exercised.
>
> (a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's
>
> (1) Transacting any business in this State;
>
> (2) Contracting to supply services or things in this State;
>
> (3) Causing tortious injury by an act or omission in this State;
>
> (4) Causing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services

rendered, in this State;

(5) Causing injury in this State to any person by breach of warranty expressly or impliedly made in the sale of goods outside this State when he might reasonably have expected such person to use, consume, or be affected by the goods in this State, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State; - - -.

Sub-paragraphs (a)(6) and (7) of said Section deal with real property in this State, and contracts of insurance. Sub-paragraph (b) provides that whenever "jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted." Such is the case here.

Applying the facts as determined from the record, it is clear Durell transacts no business in Virginia. It has no office here, is not licensed to do business here, and has no employees, agents or officers here. It has not entered into any contract to do business, sell or furnish materials, services or things in Virginia. It has no customers or contacts in Virginia. It does not manufacture, fabricate, buy, sell or otherwise deal in merchandise in Virginia. If one contends that when a representative of Durell came into Virginia to inspect the window frames and to assist in alleviating the leaking windows, and this single act brought Durell within the provisions of the statute of transacting business in the State, is to go far beyond any previous holding of our courts and statutes like the one here. It is difficult to believe that the courts could hold such a single act as constituting transacting business.

What Judge Sobeloff said in *Erlanger Mills* v. *Cohoes Fibre Mills*, 239 F.2d 502, 507 (4th Cir. 1956) is particularly pertinent, namely:

> ---We cannot shut our eyes to the disorder and unfairness likely to follow from sustaining jurisdiction in a case like this. It might require corporations from coast to coast having the most indirect, casual and tenuous connection with a State to answer frivolous law suits in its courts. To permit this could seriously impair the guarantees which due process seeks to secure.
>
> Furthermore, to sustain jurisdiction here would not only be offensive to the due process clause, but it would involve the danger of grave burdens and impediments to interstate commerce, if the door should be opened to similar legislation by other States. Davis v. Farmers' Cooperative Equity Co., supra; Atchison, T. & S.F.R. Co. v. Wells, 265 U.S. 101, 44 S.Ct. 469, 68 L.Ed. 928; cf. Denver & Rio Grande Western Railroad Co. v. Terte, 284 U.S. 284, 52 S.Ct. 152, 76 L.Ed. 295; and International Milling Co. v. Columbia Transportation Co., 292 U.S. 511, 54 S.Ct. 797, 78 L.Ed. 1396.

See also *Beaty* v. *M.S. Steel Co., Inc.*, 401 F.2d 157 (4th Cir. 1968).

The cause of action did not arise from sending the person to Virginia to make an inspection. The accident had already occurred. Here there was no acting "as to a cause of action arising from the person's transacting any business in this State." Code of Virginia, 8-81.2.

Durell's operations are conducted outside of Virginia. It has made no contract in Virginia or to be performed in Virginia, nor has it contracted to perform services or supply things in Virginia. The evidence does not bring this case within the provisions of Section 8-81.2(a)(2).

Under 8-81.2(a)(3), jurisdiction can only be obtained over one "causing tortious injury by an act or omission in this State." Applying the evidence before the Court, which is set out above, the causing of tortious injury "by an act or omission in

this State" is not shown. If an act or omission occurred, it was at Seattle. The evidence does not even suggest it occurred in Virginia.

Sub-paragraph (a)(4) [8-81.2(a)(4)] provides for jurisdiction as to a cause of action arising from the person's "Causing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenues from goods used or consumed or services rendered, in this State." The occurrence of the injury in Virginia, and the occurrence of the act or omission out of Virginia does not complete the jurisdictional requirement. The person over whom jurisdiction is sought must be one who *regularly does or solicits business*, or engages in some other *persistent course of conduct*, or derives substantial revenues from *goods used or consumed* or *services rendered, in this State*. It means substantial. *Erlanger Mills* v. *Cohoes Fibre Mills*, supra. As pointed out above, Durell does not solicit any business in Virginia, it renders no services in Virginia, it engages in no persistent course of conduct in Virginia. There is no evidence it derives substandial revenues from goods used or consumed in Virginia. It would be pure speculation to say that it does.

Lastly, sub-section (a)(5) [8-81.2(a)(5)] provides for service on one "Causing injury in this State to any person by breach of warranty expressly or impliedly made in the sale of goods outside this State when he might reasonably have expected such person to use, consume, or be affected by the goods in this State, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State." To come within the provisions of this sub-section there must be a breach of warranty "in the *sale of goods*;" secondly, it must be one who "*also* regularly does or solicits business or engages in other persistent course of conduct, or derives substantial revenues

from *goods* used or consumed or services rendered *in this State*." Durell does not *regularly* do or solicit business in Virginia, or engage in other *persistent* course of conduct, or derive substantial revenues from goods used or consumed or services rendered *in this State*.

The motion to dismiss is therefore granted and service of process on Durell is quashed and it is dismissed as a party defendant.

/s/ Richard B. Kellam
United States District Judge

Norfolk, Virginia
May 1st, 1969.